

UNITED STATES OF AMERICA )  
v. )  
Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

) RULING: Prosecution Motion  
To Admit Evidence  
)  
)  
29 August 2012

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1. The Government moves to pre-admit the following evidence enclosed to Appellate Exhibit 278:

Enclosure 5: OSC User Information Files (bmannning) with attestation;

Enclosure 6: OSC User Information Files (bradass87) with attestation;

Enclosure 7: OSC Logs (bmannning & bradass87) with attestation;

Enclosure 8: Intelink .22 & .40 Logs with attestation;

Enclosure 9: Intelink Passport Account Information with attestation.

2. Government proffers that the above evidence is admissible as machine generated data and as properly authenticated business records.

3. Defense objects on the ground that the keystroke searches by the custodian of the record are testimonial statements and the resulting data are records of searches and are also testimonial statements.

#### **Findings of Fact:**

1. The data in Enclosures 5, 6, and 7 were maintained by the CIA in electronically searchable databases for business purposes. The data in Enclosures 8 and 9 were maintained by the NSA in electronically searchable databases for business purposes.

2. The data was collected prior to or contemporaneous with the dates of the charged offenses and was maintained by the entity for business purposes before the query for information by law enforcement.

#### **The Law:**

1. The Sixth Amendment precludes testimonial hearsay from coming into evidence against an accused without cross-examination of the declarant unless (1) the declarant is unavailable and (2)

the declarant was subject to prior cross examination. *U.S. v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

2. A statement is testimonial if made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial. A document created solely for an evidentiary purpose made in aid of a police investigation is testimonial. While formalized certifications of results in lab reports are testimonial, machine generated data and printouts are not statements and, thus, they are not hearsay. *Sweeney*, 70 M.J. at 301; *U.S. v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007) (affidavit filled out by victim of check fraud pursuant to internal bank procedures admissible as non-testimonial business record even if later turned over to law enforcement.).

**Conclusions of Law:**

1. The fact that information maintained on a business related database is pulled from that database as a result of a typed in search query by the records custodian at the request of a law enforcement query does not transform machine generated data into a testimonial statement. It is the nature of the underlying data at issue not the form of the query, the fields of the query, or who made the query that determines whether the information is machine generated, a statement, or a testimonial statement.
2. Unlike the cover memorandum and results certification that were held to be testimonial statements in *Sweeney*, the machine generated data offered for admission by the Government in this case contains no additional representations or certifications that were not machine generated.
3. The records offered for admission by the Government are machine generated and not statements. They are properly authenticated. If the Government offers evidence to show their relevance, the exhibits are admissible.

So Ordered this 29<sup>th</sup> day of August 2012.



DENISE R. LIND  
COL, JA  
Chief Judge, 1<sup>st</sup> Judicial Circuit